No. 93-847

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

R. Wayne Hicks,

Petitioner

versus

John E. Roark, Jr. and
Roadside Nurseries, Inc.,
a Virginia Corporation,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF CAMPBELL COUNTY,
VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

R. Wayne Hicks
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QUESTIONS PRESENTED

(1). Whether the Decree of the Circuit Court of Campbell County, Virginia ("the Decree") deprived the Petitioner ("Hicks") his property without the due process of law?

Hicks purchased rental property with the full knowledge and consent of the opposing party in this action ("Roark") as to the terms under which Roark could eventually own some interest in the property. The property was purchased with funds provided by Hicks and by loans on which only Hicks was obligated. Roark admits to never investing a dime in the property. The rents received from the property never covered the cash expenses and produced substantial losses to Hicks. Yet the Decree of the Court determines that the property is partnership property and orders the property sold and the proceeds distributed to Hicks and Roark.

(2) Does the refusal to present evidence used to support the conclusions of the Decree constitute a violation of the due process of

law provisions?

The Decree does not allow Hicks any of the related interest costs on funds paid to lenders (approximately $500,000) or on personal funds advanced (approximately $400,000). No evidence or authority is cited to support this conclusion and no evidence or authority exists. Hicks' many requests for the Court to cite such evidence has been unanswered both by the Court and the opposing parties.

(3) Did the Decree deny Hicks the equal protection of the laws?

The Decree ignores certain statuary and common laws. Even the law of this case, as stated by the Supreme Court of Virginia when it earlier remanded the case back to the lower court, was ignored.

Parties to the Proceedings

Honorable J. Michael Gamble is the presiding judge in this case. The First National Bank of Altavista, Va. and Samuel Eggleston, Esq. of Lovingston, Va. are parties believed to have no interest in the outcome of the petition. Other parties appear on the caption of the case.

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Roark v. Hicks, 234 Va. 470 (1987)
Sands v. Bankers' Fire Ins, Co., 168 Va. 645, 192 S.E. 617 (1937)

CONSTITUTIONAL PROVISIONS

United States Constitution:

Amendment XIV

The Constitution of Virginia:
Art I, Sec. 1
Art I, Sec. 11

STATUTES

Code of Virginia:
§ 50-18(a)-(c),
§ 50-40(b),
§ 50-8(2)

TEXTBOOKS

Michie's Jurisprudence, Partnerships:
p. 279-280 & p. 340
3 Am Jur 2d, Agency:
§ 216, § 226, § 250
16A Am Jur 2d
§ 809, § 816, § 847

RECORD OF THE CASE

Memorandum of Law, Houck to Judge Johnson, dated December 6, 1983
Joint Appendix, Roark v. Hicks, (1987)
Depositions of Roark, April 5, 1983
Letter, Houck to Lane, March 4, 1988

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

John E. Roark, Jr. and
Roadside Nurseries, Inc.,
a Virginia Corporation,

v

R. Wayne Hicks, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF CAMPBELL COUNTY, VIRGINIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

R. Wayne Hicks, the petitioner herein, prays that a writ of certiorari issue to review the judgement of the Circuit Court of Campbell County, Virginia entered in the above-titled case on January 21, 1993.

OPINIONS DELIVERED

The subject of this petition begins with the judgement of the Supreme Court of Virginia dated 11-25-87 and is cited as Roark v. Hicks,

234 Va. 470 (1987). The case was remanded back to the Circuit Court of Campbell County, Va. for further proceedings consistent with the opinion. The resulting opinion of the Circuit Court, dated January 21, 1993, whose judgement is herein sought to be reviewed, is unreported.

The judgement of the Circuit Court of Campbell County is printed in Appendix A hereto, infra, pages 101-110.

JURISDICTION

The judgement of the Circuit Court of Campbell County (Appendix A, infra, pages 101-110) was entered on January 21, 1993. A timely petition for rehearing was denied in the judgement of January 21, 1993. A timely petition for appeal to the Supreme Court of Virginia was refused on June 25, 1993 and a timely petition to rehear was denied by the Supreme Court of Virginia on July 30, 1993. The jurisdiction of the Supreme Court of The United States is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States:

14th Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Virginia:

Article I, § 1:

"Equality and rights of men. - That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest, their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Article I, §11:

"Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases. - That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assemble shall not pass any law impairing the obligation of contracts, nor any law whereby

private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five."

Code of Virginia:

§ 8.01-428(B):

"Clerical mistakes. - Clerical mistakes in all judgements or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court."

§ 50-8(2):

"Unless the contrary intention appears, property acquired with partnership funds is partnership property."

§ 50-18(a):

"Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in profits and surplus remaining after all liabilities, including those to partners, are satisfied; and he must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share of the profits."

§ 50-18(b):

"The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property"

§ 50-18(c):

"A partner, who in the aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance."

§ 50.40(b):

"The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners;

(II) Those owing to partners other than for capital and profits;

(III) Those owing to partners in respect of capital;

(IV) Those owing to partners in respect of profits."

STATEMENT OF THE CASE

A. History:

Hicks is the Appellee in a previous judgement of the Supreme Court of Virginia, Record Number 841005, in which the Court rendered its opinion on November 25, 1987. The opinion concluded that a joint Venture existed and included as essentially undisputed facts that the business plan of the venturers was that the parties each would contribute $30,000 cash, finance the balance of the purchase price and development costs, and own the property jointly. The case was remanded back to the Circuit Court for the County of Campbell for proceedings consistent with the such opinion.

After the Supreme Court ruling subsequent proceedings included various hearings before Commissioner Musselman; such hearings ending in 1988. For twenty-nine months Commissioner Musselman did nothing in reference to this case until finally issuing his report on 5-25-91. Commissioner Musselman subsequently amended his report several times for errors made. Several

hearings were held by Judge Gamble on exceptions filed by the parties resulting in several tentative judgements. Hicks requested details of evidence used to support such opinions as well as presenting a motion for retrial. Judge Gamble promised prompt decisions in October; 1992, but by December Hicks saw no evidence of progress and he petitioned the Virginia Supreme Court for a writ of mandamus. The Decree of the Court was issued on January 21, 1993 and the petition for writ of mandamus was dropped.

The Decree denied Hicks' request for specific evidence and his request for retrial, computed the equities of Roark and Hicks, declared the property involved as owned by the Venture, provided for the judicial sale of the property, and set bond requirements on appeal to stay the execution of such sale. Hicks written claim of prejudice of the Court was also denied.

The Decree was appealed to the Supreme Court of Virginia which was refused on June 25,

1993. A petition to rehear was denied by the same court on July 30, 1993.

At a hearing on July 30, 1993 held before Judge Gamble, Hicks requested that certain math errors be corrected and also that the method of distribution of the proceeds of the sale be amended to comply with Code of Virginia, §50.40(b). (Appendix A, pages 194-196). Indications were that Judge Gamble would not correct these errors nor comply with the provisions of the Code. No reply has been received to this request.

Hicks was informed by telephone on October 26, 1993 that another hearing was to be held on November 16, 1993 regarding the sale of the property.

Conflicts of Decree with the Constitutions:

B. Equal Protection of the Laws:

(1) Code of Virginia §50.18(c) states:

> "A partner, who in the aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance."

The Decree allows no interest to Hicks for advances made to the partnership beyond the amount he agreed to contribute. That funds were advanced by Hicks are confirmed by the accounting in the Decree.

But Commissioner Musselman contends that Hicks agreed to make these contributions. In his report (Appendix A, p. 168-169) he states:

> "And it does not appear that Hicks' provision of operating capital on a day-to-day basis was 'in excess of amounts agreed upon.' "

This "appearance" by the Commissioner is a complete fabrication by him. This statement defies the essentially undisputed facts of the Virginia Supreme Court opinion (Roark v. Hicks, 234 Va., p. 470) who remanded "the cause for further proceedings consistent with this opinion." (Roark v. Hicks, 234 Va. 470, p.477) The same opinion is repeated by Roark in his Memorandum of Law addressed to Judge Johnson and dated December 6, 1983, p. 1 which is quoted "The initial understanding was that both Roark and Hicks would each put up $30,000 for

the purchase and development of the property and that any funds needed in excess thereof would be borrowed." Thus Roark stated and both the Supreme Court and Hicks agree to these basic facts.

There was no discussion of this issue in the hearings held by the Commissioner. No such agreement to forgo interest was ever made, implied, or even thought of by the Hicks. No such evidence exists and neither Commissioner Musselman nor Judge Gamble can produce anything to support this finding. To the contrary, there is ample evidence to support the fact that Hicks always expected interest on funds advanced by him to the Venture. The Joint Appendix used in the initial Virginia Supreme Court appeal contain documents that show this expectation on p.248, p.245, p.255, and p. 260.

In his memorandum letter opinion dated 8-25-92 Judge Gamble affirmed the Commissioner's opinion by stating "The evidence certainly supports this finding." (Appendix A, p. 133, III.(c)(8)). Hicks has requested that the

Court provide him with the specific evidence referred to. Such requests were made in the following documents:

a. Defendant's Objections to Commissioner's Report, dated 7-15-91,

b. Defendant's Request for Specific Evidence dated 9-21-92,

c. Defendant's Request for Retrial, dated 9-21-92, and

d. in the appeal to the Supreme Court of Virginia, dated 3-2-93.

Judge Gamble denied this request.(Appendix A, p. 109).

The Commissioner and Roark's attorney vacationed together prior to the Commissioner's decision, and his opinions may have been influenced by events occurring on this trip.

(2) The Decree allows Hicks interest of $34,715 on the $30,000 defaulted contribution by Roark. The interest on $30,000 cost Hicks $171,159, a loss of $136,444 to Hicks. Code of Va, §50.18(a) demands that partners shall share losses equally. Hicks objected to this inequity in his Exceptions to Commissioner's

Reports dated 5-31-93.

(3) The Decree contains math errors which Judge Gamble indicates that he will not correct. In a hearing held on July 30, 1993 Hicks presented Defendant's Memorandum of Law and Request for Amendment to Decree (Appendix A, p. 194-196) in which he requested that math errors be corrected. These errors were a part of the appeal to the Virginia Supreme Court, and Roark (Brief in Opposition to Petition for Appeal,p. 20) pleaded that:

> "these errors can be corrected by the trial court at any time. See 8.01-428(B) Code of Virginia of 1950 as amended."

Judge Gamble indicated that Hicks had had his day in Court and that the Virginia Supreme Court had rejected his petition for appeal and that he was very reluctant to change anything in the Decree. Although he stated that he would consider the requests, he has not replied to date. Every indication is that he will not change the Decree. Perhaps if the Virginia

Supreme Court had known that this was his position, they may have decided differently.

(4) The method of distribution contained in the Decree (Appendix A, p. 144) conflicts with Code of Virginia §50.40(b). In the same document referred to in (3) above, Hicks requested that the law be followed. (Appendix A, p.196). This request received the same response as indicated in (3) above.

(5) The Court erred in ruling that the real estate is included in the joint Venture. Hicks has objected to the ruling of the Court dated April 29, 1988 (Judge Goad)(Ch. Ord. Book #36, pg. 126) including the real estate and all improvements within the joint Venture. The Court ruling was premature in that it was made before any accounting of the Venture was finally determined. Michie's Jurisprudence Partnership § 21, pgs. 279-280 states:

> "Whether real estate held by persons who are partners is to be considered and treated as partnership property

depends upon the real intention of the vendee at the time the property is acquired or appropriated, and such intent may be shown by parol."

The intentions of the parties at the time of purchase was without doubt that Hicks would own the property until Roark entered the planned partnership as agreed. These conditions are confirmed by Roark's testimony:

> Kent: " You never put a dime into it of money, actually invested money into the accounts that were used to pay for anything at Windcrest Courts, did you?"
>
> Roark: "No." (Depositions of Roark, April 5, 1983, pg. 112)
>
> Kent: "You never expected your name to be on the deed?"
>
> Roark: "No. I never thought that I expected my name to be on the deed with him putting his money and all up." (Depositions of Roark, April 5, 1983, pg. 140)

A second requirement for determination of the ownership of the property is quoted from the Code of Virginia, § 50-8 (2) as follows:

> "Unless the contrary intention appears, property acquired with partnership- funds is partnership property."

If Hicks' contentions of interest are confirmed then the accounting will show that the income of the Venture did not cover the operating expenses and that no monies of the Venture were used to purchase the property. Therefore both tests of ownership are met.

(6). The Decree charges Roark for his conversion of Venture funds of $8,214.96. Interest on this amount is $19,331.37 to 7-92. No interest was allowed on the conversion as required by:

> "A conversion by the agent of funds of the principal in the agents's possession renders the agent liable in tort, and unless the agent had a lien on the property converted, or was otherwise entitled to hold it against the principal, he is chargeable with interest from the date of conversion.... Any application of the principal's money contrary to such direction constitutes a conversion..." (3 Am Jur 2nd, Agency, §226)

C. Due Process of Law:

(1) The Decree awards Roark amounts that are proven false by Roark's own evidence consisting of invoices and revised invoices that conflict with each other. Furthermore, Roark could

produce no evidence to support his claims. When Hicks sought discovery of Roark's records backing up his claim his counsel advised:

> "You seem to be looking for Roark's and Roadside's banking records for 1976, 1977, 1978 and 1978. It is my understanding that these banking records were disposed of some time ago by Mr. Roark." (March 4, 1988 letter from Houck to Lane ¶ 2.)

Hicks was required to produce every check and every deposit on all of his bank accounts during the period covered by the Venture. He was required to furnish invoices and was questioned for over one-day on his accounting report. The bank had to furnish Roark with copies of his personal financial records. Hicks had to furnish Roark with detailed schedules and copies of all notes. Hicks had to box up his records transport them to his attorney's office for examination by Roark's attorney.

Hicks had to do all of the above; Roark could furnish nothing. Some of Hicks' legitimate expenses were disallowed. Roarks' invoice was accepted entirely (except on

principle). Thus Hicks was subjected to unequal evidentiary requirements.

(2) The Decree awards Roark amounts twice because some of his claims that were allowed were for items belonging to him that were ordered to be removed by him in the initial litigation in 1983.

(3) The Decree alternately treats Roark and Roadside Nurseries, Inc. inconsistently and always to Roark's favor. Roadside Nurseries, Inc. owed the Venture $9,450.00 in unpaid rents. All of Roark's claim allowed in the Decree is the alleged expense of Roadside Nurseries, Inc. and not the personal claim of Roark. Commissioner Hawkins' determined, Joint Appendix pg. 25:

> "All of the items claimed in Ex. N except the personal time for the Roarks is allocated to Roadside Nurseries, Inc. and not a personal claim of the Roarks."

The principle of offset should be applied even if the claimed expenses were valid. Instead

the Decree alternately treats Roark and Roadside separately in regards to the liability for rents yet allows Roadside expenses to Roark personally. Thus the Decree reverses the judgement of Judge Johnson and the Supreme Court of Virginia.

(4) Hicks has no representation in the sale of the property.

(5) The Decree disallows Hicks' expenditures of $7,214.00 for architect fees. Although these plans were never used, they were made to plan for the overall development in the future and to prevent the haphazardly manner the in which the original construction was performed. But primarily it was spent in response to a "pressure letter" from Roark and others expressing their concern over the future of the Venture. This letter was sent when Roark was pretending to be only a tenant. A copy of this letter is a part of Defendant's Motion to Set Aside Verdict and Award a New Trial, dated 9-

21-92.

These plans are the property of the Venture and may be of value to any potential purchaser, and also of value in any future development.

> "An agent is not an insurer against losses due to honest mistakes or errors of judgement, and if he acts in good faith and with reasonable skill and ordinary care and diligence, he will not be liable for losses which his principal sustains." (3 Am Jur 2nd, § 216)

(6) The Decree provides no sanctions at all against Roark for any of his stealthy and unlawful acts in luring Hicks into purchasing the property he believed was his own. The only problems occurring with the accounting for interest would have been solved if Roark had only informed Hicks that he was claiming partnership interest and also interest in the property. Hicks would have acted timely to either have the courts determine the validity of his claims or would have corrected all financing to reflect the proper names and to provide the proper interest payments. Instead,

he pretended for 5 years that Hicks was the owner of the property and he was only a tenant, with the option to become a part owner as he made his promised capital contribution. He even had his attorney draft lease agreements that named Hicks as the owner of the property.

Michie's Jurisprudence, Agency, § 59 (citing Sands v. Bankers' Fire Ins. Co., 168 Va. 645, 192 S.E. 617 (1937) and Dorr v. Camden, 55 W. Va. 226, 46 S.E. 1014 (1904)) states:

> "No agent has the power to perpetrate a fraud upon his principal. ... or to coerce such principal into a contract he would not enter into upon full information."

Roark did perpetuate a fraud upon Hicks and Hicks was coerced into purchasing the property by his stealthy actions.

(9) Judge Gamble pressured Hicks to use an attorney rather that represent himself.

(10). Hicks has argued what he believes to be clear evidence and solid statute law for so

long with no results that it makes him conclude that the court is prejudiced for reasons stated in his letters to Judge Gamble dated 10-1-92 and 10-12-92 and in his Written Statement filed 2-22-93.

D. Federal Question Raised:

In the Summary of Defendant's Motion to Set Aside Verdict and Award a New Trial, filed with the Court on September 21, 1992, Hicks stated:

> "The consequences of the Court's rulings are extremely prejudiced against Hicks. Such rulings are so contrary to fundamental law and basic undeniable facts that it amounts to a unilateral suspension of laws by the Court, in defiance of Article I, Section 7 of the Constitution of Virginia prohibiting such suspensions. Additionally, the result of these prejudicial rulings, if allowed to stand, has the effect of violating the Constitutional rights of the Hicks by depriving him of his property without just compensation. Such rights are guaranteed to Hicks by both the Fourteenth Amendment of the Constitution of the United States of America and Article I of the Constitution of Virginia."

REASONS FOR GRANTING WRIT

The elected representatives of the State of Virginia enacted the laws pertinent to this case. The judgements in the Decree ignore these laws or fabricate evidence to subvert their intent. If the Decree is allowed to stand, this amounts to a usurpation by the judiciary of the legislative powers of our government.

The following quotes are from 16A Am Jur 2d regarding due process of law and are revelant to this case:

> "§ 847. Generally; necessity of evidence. Due process is absent if a party is deprived of his property or liberty without evidence having been offered against him in accordance with established rules. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence, a conclusion from the evidence of where the truth lies, the application of the appropriate laws to the facts found, and the rendition of judgement accordingly."
>
> " The due process clause has as its purposes the insuring of the fair and

orderly administration of the laws ...

The effect of the guaranty is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing...

The protection extends to rights, in the broadest sense of the term. In determining whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a person of his property without compensation." (§ 809)

"To be noted at this point are the general principles that substantive due process assures by requiring equal operation of laws and freedom from arbitrary action." (§ 816)

Hicks recognizes the noble and moral principles contained in these quotes and in the laws regarding partnership and agency that are directly controlling in this case. He has not found any statutes that he thought was unfair. He is therefore perplexed that such noble thoughts expressed in the law texts are so absent in practice. In this case he has fought the injustices for twelve years and the fight has almost ruined him both mentally and

financially. It has naturally affected his family in the same manner. All are deeply disenchanted because of the ability of the legal fraternity to ruin lives.

In actuality the Decree does the following:

1. Forces the sale of the Petitioner's property. (In all fairness the property does not belong to a partnership. It was purchased by Hicks on terms known to Roark, and only Hicks paid for the property or was obligated and still is obligated for the liens thereon.)

2. Awards a stealthy individual some ultimate amount that is pure profit to him since he never put a dime into the property, never obligated himself in any manner for the property, lied to Hicks about his intentions at the date of purchase, and maintained this deception for five years. During this time he never acted as a partner, never asked for tax information and acted always as a tenant only; even to the point of pressuring Hicks to spend money on his concerns as a tenant.

3. Awards the same character for false invoices that were presented to Hicks. He has a reputation for submitting false invoices, and has done so in this case, as found in the initial trial. His own revised invoices prove the falseness of the invoice awarded in the Decree.

4. Forces Hicks to suffer economic losses for interest paid of approximately $500,000 and interest forgone amounting to another approximate $400,000. All this while Roark suffers no loss and actually profits.

5. Provides a means of compensation to his lawyer whose original purpose was to extort $10,000 from Hicks. His intentions were shown when he told Hicks' attorney that "Hicks may as well pay Roark $10,000 because even if Hicks prevails, Roark will bankrupt any claim."

6. Provides for the sale of the property on conditions in which Hicks has absolutely no rights. The sale is controlled by Roark's attorney, who is Hicks' worst enemy. Hicks was not allowed to chose an attorney to represent

him. Instead, the judge appointed someone unknown to Hicks, who lives 50 miles from the property, and who was not interested enough in the task to appear at a hearing held on July 30, 1993 for purposes of the discussing the sale.

HOW CAN THE INTERPRETATION OF THESE NOBLE TEXTS RESULT IN A DECREE THAT IS SO UNFAIR?

Hicks can only speculate that the legal fraternity will do anything to protect their own. Roarks' attorney made a serious and foolish mistake in suing for partnership interest in a losing partnership. He did this even after proof was furnished him, during discovery, of the losses being incurred.

Likewise, the Virginia Supreme Court must have believed that the Venture was a profitable one and they were determined to award Roark something. Therefore they found a tiny mistake in the first Commissioners' report when he inadvertently referred to the rental operations as a venture and the Court converted this to

mean a joint venture despite the fact that this Commissioner also stated "At best, they entered into an 'agreement to agree' which is not enforceable in Virginia." Hicks suspects that had the Supreme Court of Virginia overturned the Decree, their desired result would not be obtained, and this is the reason that the petition for appeal was denied.

It appears to Hicks that the Virginia judicial system will ruin any life to protect their infallible image.

CONCLUSION

Hicks is no dummy, and he fully realizes that the foregoing criticism of the Virginia judicial system probably ruins his chances of a favorable decision on this petition. Nevertheless, he prays that this petition for a writ of certiorari will be granted.

Respectfully submitted,

R. Wayne Hicks
Petitioner

October 28, 1993

APPENDIX A

To

PETITION FOR A WRIT OF CERTIORARI

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VIRGINIA: IN THE CIRCUIT COURT OF
CAMPBELL COUNTY

DOCKET NO
4574B

JOHN E. ROARK, JR., et al,

Plaintiffs

v.

DECREE

R. WAYNE HICKS,

Defendant

This case came on to be heard upon the Decree of Reference entered by this Court on July 19, 1988, referring certain matters in this case to Robert M. Musselman, Special Commissioner in Chancery (Musselman), and upon Musselman's Report dated May 31, 1991, and Musselman's Supplemental Report dated May 31, 1991 together with the depositions and exhibits taken therewith after due notice, upon the exceptions filed to Musselman's report by the plaintiffs and the defendant, and was argued by counsel.

UPON CONSIDERATION WHEREOF, the Court has rendered its memorandum letter opinions dated August 25, 1992, and September 28, 1992, which rule upon the exceptions filed by the parties.

BEST AVAILABLE COPY

To the extent set forth in the August 25, 1992, and September 28, 1992, letter opinions, the Court ORDERS and DECREES that exceptions of the respective parties to the May 31, 1991, Musselman Report and the May 31, 1991 Musselman Supplemental Report are sustained. Except otherwise set forth in the August 25, 1992, and September 28, 1992, letter opinions, the Court ORDERS and DECREES that the exceptions of the respective parties to the May 31, 1991, Musselman Report and the May 31, 1991 Mussleman Supplemental Report are both confirmed in all other respects except as otherwise set forth herein. The May 31, 1991, Musselman Report and the May 31, 1991 Musselman Supplemental Report, the August 25, 1992 letter opinion, and the September 28, 1992 letter opinion of this Court, are hereby made the decisions of this Court in these matters and are expressly incorporated herein as part of this decree.

The Court notes that in paragraph three (3) of the July 19, 1988 Decree of Reference, the Court directed the Special Commissioner

that the cutoff date for the determination and winding up of the partnership is December 31, 1987. The Court has now determined this direction to be erroneous and paragraph three (3) of the July 19, 1988, decree of reference is hereby ORDERED and DECREED to be set aside and vacated.

The Court notes that the defendant served a motion of July 15, 1991, asking for an evidentiary hearing, which motion was granted by the Court and the evidentiary hearing was held on August 11, 1992.

The Court further notes that numerous hearings were held by this Court to consider the exceptions filed by the parties including hearing held on the following dates: September 19, 1991; July 21, 1992; and August 11, 1992.

The Court notes that plaintiffs served a motion on September 16, 1992, requesting certain relief and the Court rules that the relief requested in said motion is taken under advisement with the right reserved to make adjustments that are appropriate in the order

of distribution of the sale proceeds.

The Court finds that the 10.64 acre parcel of real estate (the real estate) which is owned by the venture which is the subject of this suit should be sold through a judicial sale and the Court does hereby ADJUDGE, ORDER, and DECREE that said real estate be sold by this Court in this cause, said real estate being more particularly described as follows:

> All that certain tract or parcel of land, together with the privileges and appurtenances thereunto belonging and the buildings and improvements thereon, situate, lying and being in Campbell County, Virginia, on the southeast side of the eastbound lane of U.S. Route 460 (Timberlake Road) and containing 10.64 acres, more or less, as shown on a plat entitled "Plat showing lots 8-9 and the 10-foot strip on rear of Lot 7, Timberidge Subdivision, College District, Campbell County, Virginia", dated August 25, 1976, and made by Albert E. Neighbors, Jr., P.L.S., which plat is recorded in the Clerk's Office of the Circuit Court of Campbell County, Virginia, in Deed Book 514, page 616, and reference to which plat is hereby expressly made for a more particular description thereof.
> There is expressly excepted herefrom an easement to Appalachian Power dated October 6, 1977, from R. Wayne Hicks, et als, of record in Deed Book

529 , Page 730, in the aforesaid Clerk's Office.

This being the same real property conveyed to R. Wayne Hicks by deed dated August 31, 1976, from Peggy Jean Overstreet Wilmer and Gerald F. Wilmer, her husband, which deed is duly recorded in the aforesaid Clerk's Office in Deed Book 514, page 612.

Leighton S. Houck and Sam D. Eggleston, Jr. are appointed Special Commissioners to effect the sale of the subject real estate. The Special Commissioners, before acting hereunder, shall execute bond with good corporate surety approved by the Clerk of this Court in the sum of $ 500,000.

With respect to a sale of the real estate, the Court orders that either or both John E. Roark, Jr., and R. Wayne Hicks, may for a period on ninety days from the entry of this Decree, make private offers to purchase the real estate for its fair market value as hereinafter determined by the Court. Any offer submitted by John E. Roark, Jr., or R. Wayne Hicks, shall be subject to the approval of this Court. If neither party makes an offer, or if

no offer is approved by the Court, then the real estate is ordered to be listed for sale with a real estate broker approved by the Court for a period of four (4) months for a listing price and sales commission to be approved by the Court. The real estate listing contract and any contract to purchase the real estate must be approved by the Court. The Court may extend the listing period for such additional term as it deems appropriate. The aforesaid Special Commissioners are authorized to solicit and receive private offers and to submit them to the Court for acceptance or rejection at any time. After the expiration of the listing period with the real estate broker, or any extension thereof, and if the real property has not then been sold, then the Court orders that the real property be sold through a public auction by the Special Commissioners and said Special Commissioners shall advertise the time, terms, and place of sale for at least four times for three successive weeks in the Lynchburg News and in such other manner as they

may deem best calculated to give due publicity to the sale and expose the real estate for sale by way of public auction on the premises thereof. A ten percent deposit shall be received from the highest bidder at the public auction on the date of the auction and the balance of the sales proceeds shall be due within thirty (30) days from the date of the public auction. Approval of the sale by public auction, however, will be subject to Court approval and advertised as such. The Special Commissioners are authorized to employ an auctioneering company to cry the sale, and otherwise assist in organizing and implementing the sale. Upon consummation of the public auction, the Special Commissioners shall report the results thereto to this Court.

Should either party desire to appeal this Decree to the Supreme Court of Virginia, and should either further desire that execution of this Decree be suspended during the appeal pursuant to §8.01-676.1(C) of the Code of Virginia, such party shall file an appeal bond,

with surety satisfactory to the Court, or an irrevocable letter of credit issued by a lending institution satisfactory to the Court, in the amount of $ 50,000.00 to cover the payment of all damages incurred in consequence of such suspension, and execution shall be suspended upon the filing of such appeal bond or letter of credit and the timely prosecution of such appeal.

On motion of the plaintiffs, and its otherwise appearing proper so to do, it is ORDERED that the First National Bank of Altavista, James P. Kent, Jr., Trustee, Gordon M. Kent, Trustee, and R. H. Gilliam, Jr., Trustee, under deed of trust dated December 18, 1986 and recorded in Deed Book 642, page 456 in this Clerk's Office are hereby added as parties defendant to this suit and the Court is advised that said defendants have filed their joint answer. The Court reserves for further determination as to what portion, if any, of the proceeds of sale of the real estate is covered by the lien of the deed of trust.

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The plaintiffs have orally moved the Court to make the existing tenants of the subject real estate parties to this suit for purposes of ascertaining the validity and duration of any existing lease agreements. The Court doth ORDER and DECREE that the plaintiffs may add such tenants, on or before February 15, 1993.

Additionally, the defendant has filed a Motion To Set Aside Verdict and Award A New Trial dated September 21, 1992, and a Defendant's Request For Special Evidence Rulings, also dated September 21, 1992. The Court has reviewed these motions and they are overruled and denied.

The Court finds and orders the Musselman is entitled to be paid a fee of $ 8,720.00 and reimbursed for his expenses of $91.39 as reasonable compensation for his fee and expenses in th's case and it is further ordered that his fee and expense shall be paid as follows: $ 4,405.70 by John E. Roark, Jr. and $ 4,405.70 by R. Wayne Hicks. These sums shall be paid on or before March 15, 1993.

This case is continued on the docket for further orders.

The Court dispenses with endorsement by parties. A copy of this Decree is mailed to Leighton S. Houck, Esq., R. Wayne Hicks, James P. Kent, Jr., Esq., and Sam D. Eggelston, Jr., Esq. on this date.

Enter is 21st day of January, 1993.

J. Michael Gamble, JUDGE

Note:
Exhibit B, page 201-202 contain Judge Gamble's exhibits 2 and 3 that are a part of this Decree. Petitioner could not meaningfully reproduce these documents in the format required by the rules of the U. S. Supreme Court.

August 25, 1992

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IN RE: John E. Roark, Jr., et al. v. R. Wayne Hicks, Circuit Court of Campbell County

Gentlemen:

I am writing this letter to furnish you with my rulings on the various Exceptions to the Report of Robert M. Musselman, Esquire, Commissioner In Chancery, dated May 31, 1991.

Procedurally I will first rule on the exceptions filed by the Plaintiffs. Thereafter I will rule on the exceptions of the Defendant. The ruling on each exception by the Plaintiffs and the Defendant will correspond in number to the numbered exception made by such party.

I am also attaching a corrected summary of the accounts which incorporates my rulings into the financial accounting between the parties.

RULING ON EXCEPTIONS OF PLAINTIFFS

In each numbered paragraph below the Court will rule on the numbered exception of the Plaintiffs. Therefore the Court's numbered ruling will correspond to the numbered exception of the Plaintiffs.

1. This exception is partially granted. The entire proceeds of the note should be classified as rental income ($8,214.96) in 1982. One-half of the promissory note ($4,107.48) should have been included in Mr. Roark's capital account and one-half in the same amount should have been included in Mr. Hicks' capital account.

In Roark v. Hicks, 234 Va. 470,474 (1987) the Supreme Court of Virginia held that Hicks' claim on the note against Roark should be dismissed because all other parties to the note were discharged by operation of law under §8.3-601(3) of the Code of Virginia when Mr. Hicks paid-off the note. There is maxim that in chancery matters that equity "follows the law". Hagan Estates v. New York Mining Co., 184 Va.

1064, 1073 (1946). Accordingly, if Mr. Hicks lost his claim at law he should not be able to reclaim the benefit in equity.

Accordingly, the proceeds of the note should be classified as rental income and one-half included in the capital account of each party. Section 50-18 of the Code of Virginia, of course, requires that the partners share profits equally.

2. This is generally overruled. The Supreme Court of Virginia specifically found that the joint venture had not been wound up and terminated at the time of the entry of the final decree. Further, the Supreme Court of Virginia remanded this case back to the trial court for further proceedings. These proceedings, of course, consist of the instant winding up and termination of the venture. Therefore, in this procedural exercise it is not believed that the Supreme Court intended for this Court on remand to be bound by the factual rulings of the earlier Commissioner who did not investigate the status of the parties

in their present posture of winding up and terminating the venture. The Supreme Court of Virginia has held that nothing decided on a prior appeal can be re-examined on a second appeal. Steinman v. Clinchfiled Coal Corp. 121 Va. 611, 621, 93 S.E. 2d 684, 687 (1917). In the instant case neither the first Commissioner, Mr. Hawkins, or the Supreme Court reviewed any issues involved in the dissolution or winding up of the joint venture. Thus, this Court is not bound on these issues by the previous rulings.

3. This exception is overruled for the reasons stated by both Commissioner Hawkins and Commissioner Musselman. This is a factual issue which has been resolved by the trier of fact, the Commissioner In Chancery. The findings of the Commissioner In Chancery are supported by the evidence and therefore should not be overturned. Hill v. Hill, 227 V. 569, 318 S.E. 2d 292 (1984).

4. This exception is overruled. The reason why the Court is not bound by the

factual findings of the first Commissioner is resolved in Exception Number 2 above. Additionally, there is sufficient evidence for the Commissioner to reach his decision on the portion of the claim by Mr. Roark for work that he performed for the joint venture.

5. Exception Number 5 is sustained. A sale of the real estate will be ordered. There is simply no way to wind up and terminate the joint venture business unless a complete liquidation of the enterprise property occurs. Therefore the Court will forthwith appoint Mr. Houck and Mr. Lane as Special Commissioners to effect a sale of this property in a commercially reasonable manner, This is a Court ordered dissolution under §50-32 and partnership real property shall be used for settlement of accounts under §50-40. As held in Gathwright v. Fulton, 122 Va. 17, 29 (1917), the usual method of settling partnership property "both real and personal", and divide the net proceeds. The Supreme Court of Virginia further stated in Gathwright v.

Fulton:

> Neither party has a right to compel a division in kind, or require the other to accept what, according to a valuation, his interest may be worth. Equity always desires the value of the subject to be ascertained in the way it can best be ascertained, by sale and conversion into money. 122 Va. at 29.

6. This exception is partially sustained and partially overruled. The Plaintiffs cite authority that partners and joint venturers should not be required to pay any interest after the date of dissolution (August 4, 1978). 59A Am. Jur. 2d §1018. However, where one of the partners does not contribute his share of the original capital, and the other partner furnishes the capital, the partner who furnishes the capital is entitled to recover interest on the share of the original capital which would have been contributed by the non-performing partner. 59 A Am. Jur. 2d §1015; Parish v. Bainum, 306 Ill. 618, 138 N.E. 147, 151 (1923).

In the instant case Roark was to put in $30,000.00 capital. When he did not put in the $30,000.00 capital, Hicks went ahead with the

transaction and paid for the real estate which is the joint venture property with his $30,000.00 capital investment, and with the mortgage payments paid over time. Thus, Hicks contributed the share that Roark was supposed to contribute in the initial $30,000.00 capital contribution and should receive interest on the portion of Roark's initial capital contribution that he (Hicks) paid.

The Court does rule, however, that the $2,374.80 portion of the expenses allowed by the Commissioner under "capital outlays" should be credited to Roark's initial capital obligation. A fair reading of the evidence and the exhibits is that Roark and Hicks agreed that the work that Roark performed on the premises would be credited on his share of the initial capital contribution. As set forth on the Exhibit at page 52 of the Appendix of the appeal to the Supreme Court of Virginia the $ 2,374.90 consists of $ 1,224.80 to Timberlake Lighting for lighting fixtures, and $ 1,150.00 to Weather Conditioners for air conditioners

installed. Therefore this a capital investment. Accordingly the interest at the legal rate should accrue on $ 27,625.66 rather than on $ 30,000.00. This interest will accrue at the legal rate as established by statute in effect from time to time after August 31, 1976.

7. This exception is overruled. A fair reading of Roark v. Hicks, 234 Va. 470 (1987) is that the Supreme Court of Virginia agreed that the dissolution date for the venture was August 4, 1978. The factual evidence supports this position also. The testimony of the parties clearly indicates that neither party believed that the joint venture and/or partnership could continue after August 4, 1978. It is clear that on or after August 4, 1978 it was at least the expressed will of Mr. Hicks that the venture be dissolved and this constitutes one of the causes for dissolution under §50-31 (c) of the Code of Virginia. Further, as defined by §50-29 of the Code of Virginia, there was a change in the relation of the partners at that point caused by the

cessation of both partners to be associated with a joint venture.

8. This exception is overruled. The ruling of the Commissioner on this issue is certainly supported by the evidence. The evidence clearly supports the conclusion that both Roark and Hicks have aggressively asserted and pursued their claims in this matter. It is this aggressive pursuit, for which they are both equally responsible, that has delayed the resolution of this matter. Each of them has prevailed and lost on various claims that each have asserted. Therefore it cannot be concluded that either unreasonably pursued his claim in order for the Court to sanction the other on this basis alone.

9. This exception is sustained. The three Shoppe by the Grapevine checks totaling $3,000.00 were arbitrarily reclassified loan payments by Hicks. They were clearly rent payments. Therefore the rent income for 1983 for the joint venture should be increased by $2,400.00, and for 1984 should be increased by

$600.00.

10. This exception is overruled. By both statutory law and the common law partners and joint venturers share in both profits and losses equally even if there has been an unequal contribution of capital. 14 A M. J., Partnerships, §70; Gathwright v. Fulton, 122 Va., 17, 29 (1917); §50-18 (b) Code of Virginia (1950), as amended.

11. This exception is overruled. The $ 1,000.00 claim for gas was not proven, and the Commissioner's ruling that denied this claim is supported by the lack of evidence. The salary claim by Mr. Roark of $ 5,600.00 should be denied on both factual and legal grounds. Section 50-18 (f) of the Code of Virginia does not allow a partner to recover for acting in the partnership business. If this claim were allowed then Mr. Roark would be paid for acting in the partnership business. Additionally, there was not sufficient evidence to prove the $ 5,600.00 claimed and the Commissioner's ruling on a factual basis was supported by the

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lack of evidence. The issue of res judicata has already been addressed under Exception Number 2 above.

12. This exception is overruled because the weight of the evidence supports the conclusion of the Commissioner In Chancery.

13. This exception is overruled. There have been an additional evidentiary hearing on the supplemental report and the information set forth in the supplemental report have been stipulated to by the Plaintiff and Defendant.

14. This exception is overruled. Both Commissioner Hawkins and Commissioner Musselman have ruled against the Plaintiffs on this issue. The evidence supports the rulings of both Commissioners.

15. This exception is overruled. Factually, the evidence supports the conclusion that the real estate is the capital of the joint venture. Therefore the principal of the mortgage payments paid on the Wilmer note were contributions to capital. The Commissioner reviewed the evidence and the evidence amply

supports this conclusion. The law is clear that where the parties intend a payment to be capital it is classified as capital. Rogers v. Clements, 162 N.Y. 422, 56 N.E 901 (1900); 59 A Am. Jr. 2d, Partnerships, §1010. The evidence supports the conclusion of the Commissioner that principal payments on the Wilmer note were on the capital account since this is the capital of the partnership.

16. This exception is overruled. The evidence supports the conclusion of the Commissioner that Hicks does not personally owe Roark anything other than whatever interest in the joint venture Roark may have.

17. This exception is overruled. This is one of the material issues in the case. This also impacts on the exceptions that Mr. Hicks filed to the report which will be addressed later. Mr. Hicks maintains that all payments on the mortgage payment were advances. Mr. Roark maintains that there was sufficient income generated by the joint venture to pay the mortgage payments and therefore Mr. Hicks

is incorrect in maintaining it should go to his capital account because he paid it out of his own funds.

First, whether a payment is an advance, expense, or payment to capital is a factual issue. 59 A Am. Jur. 2d 1009; Nogueras v. Maisel and Assoc. of Michigan, 142 Mich. App. 71, 369 N.W. 2d 492, 497 (1985). In this factual determination the Commissioner has found that the principal portion of the mortgage payments were intended to be payments on capital by Mr. Hicks. The records support this conclusion.

Additionally, the monthly and annual accounting furnished by Mr. Hicks shows that he had to pay out of his own resources in excess of $ 90,000.00 during the period from 1976 to 1985 over and above revenue of the venture. This is correctly attributable to capital by the Commissioner In Chancery. The cash flow summaries prepared by Mr. Hicks show that from 1976 to 1987 expenses of the venture (including capital expense) exceeded income by

$161,626.00. See Appendix 2(a) to Hicks discovery answers.

18. This exception is overruled except as specifically ruled otherwise in this opinion. The issue of whether the expenses were related to the venture business and necessary for the winding up of the venture is a factual decision determined by the Commissioner based on the evidence. The evidence is sufficient to support this ruling. Mr. Hicks had authority under §50-33 and 50-37 of the Code of Virginia (1950), as amended, to windup the venture business and any expenses reasonably related to that business certainly could be assessed as a cost of the venture.

19. This exception is overruled. The evidence supports the findings of the Commissioner on this issue, except as modified herein. It should be noted that Mr. Hicks stated on numerous occasions that his accountings were based on his assumption that this was a sole proprietorship. It was not until the Supreme Court of Virginia ruled in

Roark v. Hicks, 234 Va. 470 (1987) that the enterprise is a joint venture that he realized his classification was incorrect. The report of the Commissioner does adequately itemize the amount applied to capital each year. This is easily followed by reference to cash flow summaries. Appendix 2 (a) Hicks discovery.

20. This exception is sustained. These expenses were of no value to the joint venture. These expenses were incurred for architectural plans that were never used, and had no hope of being used at the time that they were expended. It did not advance the purpose of the joint venture in any manner, nor did it assist in the dissolution and termination of the joint venture. Accordingly, it violates the provisions of §50-33 and 50-35 of the Code of Virginia (1950), as amended. Therefore, $985.00 is not allowed as an expense in 1981, and $ 6,229.00 is not allowed as an expense in 1982.

21. This exception is partially overruled and partially sustained as set forth in

Exception Number 1 above.

22. This exception is sustained. Both parties object to dropping Roadside Nurseries, Inc. as a party. Roadside Nurseries, Inc. is a defunct corporation that is no longer in existence, and previously declared bankruptcy. Nonetheless some of the issues in this case still involve Roadside Nurseries, Inc. and accordingly it should remain as a party.

23. This exception is overruled. The fee request of the Commissioner will be granted. The fee and costs of the Commissioner In Chancery will be divided equally between the parties.

24. This exception is overruled. The evidence supports the ruling of the Commissioner. It is clear that nothing prevents Mr. Roark or Roadside Nurseries, Inc. from obtaining this property. It is the fault of Mr. Roark and Roadside Nurseries, Inc. rather than Mr. Hicks or the joint venture that this property was not removed. The evidence supports the ruling by the Commissioner.

25. This exception is overruled. In essence, Mr. Roark wants Mr. Hicks to pay the debt of a third party that he has not agreed in writing to pay. §11-2(4) Code of Virginia (1950), as amended. This, of course, violates the statute of frauds. There is no evidence to support any allegation that Mr. Hicks is guilty of any wrongdoing or fraud with reference to the inability to collect these rents. In fact, the evidence supports the conclusion that Greenways was an effort to enhance the revenue of the joint venture.

26. This exception is partially overruled and partially sustained. It has been addressed in Exception Number 6 above. Credit of $2,374.80 is granted on the original capital account of Mr. Roark.

27. This exception is overruled. The treatment of personal tax benefits is outside of the scope of the proceeding. Subparagraph Number 2 has been overruled elsewhere in this report.

28. This exception is overruled. It is

too general for a specific ruling.

29. This exception is overruled as being too general, and it has been ruled on in other parts of this letter opinion.

30. This is partially sustained and partially overruled. The evidence supported the revised findings of the Commissioner that the capital improvements amounted to $204,163.48. This does not include the initial capital outlay of $ 30,000.00 or the principal note payments on the Wilmer note of $90,000.00. see Defendant's Exception Number II (1) (j). The Court agrees that the correct capital treatment for any gain or loss from the sale of real estate should be computed in the manner suggested by the Commissioner In Chancery.

31. This exception is overruled. The report of the Commissioner is very thorough in all respects. The evidence is supported by documents supplied by Mr. Hicks on the financial aspects of the venture. Simply by following the cash flow summaries (Appendix 2 (a)), and supporting disbursement sheets, it

can ascertained what was included in the capital amount.

32. This exception is overruled. The burden of proof has been satisfied by the evidence as ruled by the Commissioner, except as modified in this opinion.

RULINGS ON EXCEPTIONS OF DEFENDANT

In each numbered paragraph below the Court will rule on the numbered exception of the Defendant. Therefore the Court's numbered ruling will correspond with the numbered exception of the Defendant.

I. These nominal errors are excepted and corrected.

*II. (1) (a-b). This is sustained.

*II. (1) (c). This is sustained.

*II. (1) (d-h). This is sustained.

*II. (1) (i). This exception is sustained.

*II. (1)(j). This exception is sustained.

*II. (1) (k). This exception is sustained.

*II. (1) (l). This exception is sustained.

111.(a) (3). This exception is overruled. Under the law of Virginia interest is not compounded in absence of an express agreement, and there in no allegation or proof of express agreement in the instant case. Pindall v. Bank of Marrietta, 37 Va. (10 Leigh) 481 (1839). Additionally, the Code of Virginia sets the legal rate of interest that applies if no interest rate set. This is a simple interest rate as defined by the Code. Virginia Code §6.1-330.53 set the legal interest rate at six percent per annum prior the amendment of the statute on July 1, 1987. Thereafter the legal rate of interest is eight percent per annum. This is a simple interest rate. Creech v. Norfolk Air Conditioning, 237 Va. 320, 327, 377 S.E. 2d 605 (1989).

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*Commissioner Musselman made all corrections except II (1)(k), in his revised corrected summary through December 31, 1987, which was forwarded by cover letter of September 30, 1992. The Court will incorporate II (1)(k) at the end of this report.

III. (c) (5). This exception is overruled. It goes to the weight of the evidence. Mr. Hicks submitted evidence that he incurred borrowings for both this project and his business in Altavista, and paid interest on these obligations. However, the debts for these obligations were combined. There is simply no way to separate these debts and distinguish between the portion of the debt incurred for Altavista, and the portion of the debt incurred for the project that is a part of this suit.

Also, there is no authority that allows Mr. Hicks to recover the interest rate incurred on his bank borrowings without any express agreement. In fact, the law is exactly the contrary in Virginia. See discussion in exception above.

In allowing the interest on the Wilmer note the Commissioner did not take a contradictory position by not allowing the interest on the other obligations. The Wilmer note was a specific capital obligation for this

specific project where interest was contracted. Hicks own investment in capital cannot earn interest. §50-18(d) Code of Virginia (1950), as amended. The other obligations for which Hicks claims are not so defined.

The evidence supports the findings of the Commissioner that the money which Mr. Hicks furnished over and above the rental and other income of the venture went to capital expense rather than to an advance. It appears that the evidence supports the conclusion that revenue generated each month met the ordinary operating expenses of the venture outside of the advances for capital that Mr. Hicks made.

III.(c) (6). This exception is overruled. The evidence supports the finding of the

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*Commissioner Musselman made all corrections except II(1)(k), in his revised corrected summary through December 31, 1997, which was forwarded by cover letter of September 30, 1992. The Court will incorporate II (1) (k) at the end of this report.

Commissioner that to the extent funds of the joint venture were available for the payment of interest, they were utilized to pay interest on the Wilmer note. Further, Mr. Hicks misreads the statement of the Commissioner at Page 10, Paragraph One.

III.(c) (7). This exception is overruled. The Commissioner did not find as a matter of law that expenditures of the joint venture for capital improvements constituted "contribution to partnership capital". In fact, the Commissioner went on to say that he "has not treated them as such".

III.(c) (8). This exception is overruled. The issue of whether there was an agreement for Mr. Hicks to pay a certain sum of operating capital or not is a factual issue. The Commissioner resolved this against Mr. Hicks. The evidence certainly supports this finding.

The memorandum cited by Mr. Hicks filed at Page 245 of the Joint Appendix refers only to the indebtedness incurred for constructing the building for the use of Roadside Nurseries,

Inc. or Honeyshuck Farms. It did not address the actual operating capital that would or would not be contributed to the venture.

III.(c) (10). This exception is overruled. First, the evidence did not support the finding of any particular interest rate to be applied to this enterprise because Mr. Hicks borrowed money for other purposes. Additionally, the specific interest rate was not proved by Mr. Hicks.

Even more important, however, the principal portion of the note payments to Wilmer and the capital improvements that were constructed were classified as contributions to capital. These cannot bear interest. Therefore Mr. Hicks did not present sufficient evidence to distinguish the contributions to capital versus other contributions (advances) he had made in order to recover interest.

III.(c) (11). The same reasons for the denial of interest previously set forth in this report apply. Again, the payments for the real estate and the payments for improvements were

classified as contributions to capital for which interest could not be recovered. The evidence supported the finding of the Commissioner that the remaining operating expense of the venture was paid for out the operating revenues (rent). Therefore Hicks is not entitled to recover for any interest on any advances because none of the payments by Hicks over and above the rent were classified as advances, but were classified as contributions to capital for which interest is not recoverable. This was supported by the evidence.

III.(d) (12). This is overruled because the Court has ruled that repayment of the $ 8,214.96 is not a proper part of this account.

III.(e) (13). This exception is overruled on the grounds previously stated.

III.(e) (14). This exception is overruled on the grounds previously stated.

III.(e) (15). This exception is overruled. Again, the evidence supports the ruling of the Commissioner. For reasons stated

earlier the evidence does not support interest on the funds advanced by Mr. Hicks.

III.(f) (16). This exception is overruled. This is a factual finding by the Commissioner that is supported by the evidence. There is credible evidence admitted at the original Commissioner's hearing and at the subsequent Commissioner's hearings that Mr. Hicks treated the obligation of $ 18,440.14 as on obligation owed to Mr. Hicks personally, and treated this at least as part of Mr. Roark's initial capital contribution.

IV. (3). This exception is overruled for reasons stated previously.

IV. (4). This exception is overruled. This is a factual issue that was supported by the evidence.

IX. (1). This really is not an exception, however, the Court has considered all these records and treats all these records as exhibits.

IV> (5). This exception is overruled. This is a factual issue. The evidence

supported the finding of the Commissioner that there was an agreement to pay Mr. Roark these sums. Therefore they do not constitute renumeration for action in the partnership business.

IV. (6). This exception is overruled because it is a factual issue, and the evidence supports the ruling of the Commissioner as set forth above.

IV. (7). This exception is overruled. This is a factual issue that is supported by the evidence.

IV. (8). This is a factual issue, and the Commissioner's ruling is supported by the evidence.

IV. (9). (This numbered exception was repeated). This exception is overruled. The rents were due from Roadside Nurseries, Inc., a corporation. The Commissioner found, however, that the expenditures were due to Roark personally per the agreement between Roark and Hicks.

V. (2). This exception is overruled.

The evidence demonstrated that Hicks had already obtained a judgment against Roadside Nurseries, Inc. for this sum.

VI. (1). This exception is overruled. Mr. Hicks has shown no damage nor any monetary detriment as a result of the actions by Mr. Hicks. Further, there is no evidence of any duty by Mr. Hicks to keep such records.

VI. (2). This exception is overruled. The evidence supports the ruling of the Commissioner.

VI. (3). This exception is overruled. The evidence supports the ruling of the Commissioner.

VII. (1). This exception is overruled. It has been ruled on previously. The checks should have been classified as rents rather than loan payments as previously ruled by the Court.

VII. (2). This exception is overruled. The evidence supports the ruling of the Commissioner.

VIII. (1) This exception is overruled.

This is a factual and a legal issue. The evidence supports the ruling of the Commissioner. Additionally, these expenses are not legally allowed because they would constitute compensation for work in the joint venture business.

IX. (2). This exception is overruled. Notwithstanding the statement of the Commissioner interest in this case cannot be compounded.

IX. (3). This exception is overruled. It really little bearing on the case.

IX. (4). This exception is overruled. This exception goes to the weight of the evidence. The evidence supports the ruling of the Commissioner.

X. (2). This exception is overruled. Notwithstanding who would agree to the modification, both parties did not agree to the modification.

X. (3). This exception is overruled. In effect, however, each party will know how it stands at the completion of the Court's ruling

in this matter and therefore this exception is moot.

X. (4). This exception is sustained as previously ruled.

X. (5). This exception is overruled. The weight of the evidence supports the ruling that the real estate is in the joint venture.

X. (6). These exceptions are sustained to the extent that the final rulings of this Court on the capital balance change the figures of the Commissioner In Chancery. See Supplemental Rulings below.

X. (7). This exception is overruled.

SUPPLEMENTAL RULINGS

1. Utilizing the Corrected Summary through December 31, 1987, the Summary for 1988 through 1990, and the information set forth on Hicks' Exhibit 92-A (admitted into evidence on August 11, 1992) the Court has arrived at a figure for the capital account of both Mr. Roark and Mr. Hicks. A copy of the modified summaries from 1976 through July, 1991 are attached. Additionally, using the information

for income collected and operating expenses for 1991 and through July, 1992 ascertained from Hicks' Exhibit 92-A the Court has arrived at the additions to both the capital of Hicks and the capital of Roark. For the period from August 31, 1976 through December 31, 1990 the Court has interlined its figures based upon the rulings set forth herein in this report.

A few comments must be made with reference to each time period. First, for the period from August 31, 1976 through December 31, 1987, it appears to the Court that Commissioner Musselman under-calculated the interest accumulated at the legal rate applicable to capital not invested during various portions of this time period. Accordingly, although the Court has reduced the initial capital not invested during various portions of this time period. Accordingly, although the Court has reduced the initial capital investment the actual interest figures for this time period on capital not invested are higher. Next, on the summary for 1988 through 1990, the interest on

capital investment has been calculated on the basis of $ 27,625.66 rather than $ 30,000.00 in accordance with the ruling of the Court on Plaintiff's Exception Number Six. Also, the Commissioner erred in subtracting this interest figure from the total additions of Hicks on the summary for 1988 through 1990 rather than adding this figure. This figure was also placed in the wrong column. Also, for the calendar year 1988 the proceeds for the lapsed option contract in the amount of $ 11,410.00 should be included under other income. This means that it would be deleted as a debit under capital outlay and the share of both Roark and Hicks added to capital for 1988 would be increased by $ 5,705.00.

The total income for 1991 is $ 23,434.40. The operating expenses are $ 11,520.05. The total profit for 1991 is $ 11,914.35. One-half of this sum ($5,957.17) should be added to the capital account of Roark and Hicks.

The total income through July, 1992 is $ 11,430.00. The total operating expenses

through July, 1992 are $ 4,086.60. The net profit for the period through July, 1992 is $ 7,343.40. One-half of this sum ($3,671.70) is to be included in the capital account of each party. Interest for 1991 through July, 1992 in the amount of $ 3,499.19 must be deducted from the capital account of Roark and added to the capital amount of Hicks.

2. For the period from August 31, 1976 through July 31, 1992 the capital account balance for Roark and Hicks, respectively is:

Roark	$ 77,094.76
Hicks	$ 455,800.96

The Court recognizes that these figures will be modified slightly for the period from July 31, 1992 until the sale of the real estate is consummated. This can be done in the final accounting to the Court after the conclusion of the sale of the real estate.

3. The total cost of the real estate ($120,000.00) plus improvements ($204,163.48) is $ 324,163.48. The net proceeds of sale above this figure, after deduction for costs of

sale, is profit that will be divided equally and added to the capital account of Roark and Hicks respectively. If upon sale it brings less than the cost and expenses, the loss will be divided equally and deducted from the capital account of each. The assets of the venture after payment of any venture debts, will be divided between Roark and Hicks in accordance with the relative percentage of their capital accounts.

4. The Court has marked the Cash Flow Summaries for August, 1976 to August, 1988 and attached expense statements as Court Exhibit #1. The reason the Court has done this is because this exhibit is particularly important. This is Appendix 2(a) to Hicks discovery. Additionally, the Court has marked the Corrected Summary through 1987 as Court Exhibit #2, and the Summary as corrected for 1988 through 1990 as Court Exhibit # 3. Attention also should be paid to Exhibit 92-A admitted into evidence on August 11, 1992. Court Exhibit #3 contains the figures extracted from

Exhibit 92-A. Court Exhibit #2 and #3 are attached to this report.

5. The Court appoints both Mr. Houck and Mr. Lane as Special Commissioners to sell the real estate which is the partnership property. The Special Commissioner are authorized to sell this by either public or private sale. Before acting under this decree they shall post bond in the amount of $ 450,000.00 with good corporate surety approved by either the Court or the clerk. If Mr. Houck and Mr. Lane do not wish to serve as Special Commissioners, the Court will appoint a third person.

If the real estate is listed with a real estate firm then the Court directs that the real estate listing contract be approved by the Court prior entering into the contract. Otherwise, the type of sale public or private, etc., is left to the discretion of the Commissioners with leave of the Commissioners to seek the guidance of the Court if this should be necessary.

6. The fee of Mr. Musselman is approved.

Each party shall pay one-half of the fee. This fee shall be paid on or before October 1, 1992.

7. The Court understands that there are deed of trust liens against the real estate. The portion of the debt applicable to this venture must be ascertained. If this cannot be done through agreement between partied and lenders the Court will hold a hearing on this issue. If this is necessary, of course, the lenders must be made parties.

8. Mr. Houck and Mr. Lane are directed to jointly prepare the Decree carrying out the decision of the Court. I would like for this Decree to be completed within two weeks.

Sincerely yours,

J. Michael Gamble, Judge

JMG/kst

TWENTY-FOURTH JUDICIAL COURT
OF VIRGINIA
COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND BEDFORD
COUNTIES OF AMHERST, BEDFORD,
CAMPBELL AND NELSON

September 28, 1992

Mr. R. Wayne Hicks
Hicks & Hicks, CPA
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Altavista, VA 24517

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Lynchburg, VA 24505

IN RE: Roark, et al. v. Hicks

Dear Mr. Hicks and Mr. Houck:

I am writing this letter to follow several matters which were discussed at the previous hearing, and also to address some of the upcoming issues.

First, I directed that Mr. Mussleman be paid one-half of his fee by the first of October. Because the entry of the decree has been delayed, and a sale is pending, each party may defer this payment until further direction

of the Court after our next meeting.

The issue has arisen whether or not I should appoint just Mr. Houck as Special Commissioner, now that Mr. Lane has withdrawn, or whether I should appoint Mr. Lane and/or some other attorney. After considering this issue I have decided that I will not appoint Mr. Lane unless he is an attorney in the case. I will, however, consider appointing another attorney to serve with Mr. Houck who is employed by Mr. Hicks prior to the October 13, 1992 meeting that is scheduled. If Mr. Hicks does not employ an attorney by that meeting I may appoint as a Co-Special Commissioner an attorney who has had no involvement in this matter.

With respect to a sale of the real estate, I think that either party should be given thirty (30) days from the entry of the decree of sale to make a private offer to purchase the real estate for fair market value. This offer, of course, is subject to approval by the Court. If neither party makes an offer within thirty

(30) days then I suggest that the property either be listed for sale with a real estate agent or advertised for sale by the Special Commissioners. If the property does not sell by the end of March, 1993 then I will probably direct that an auction sale be held in the spring. All sales will be subject to Court approval.

I will need to have to evidence of fair market value. If neither party updates the previous appraisal then I will have no alternative but to rely upon the old Lowell Milton appraisal and/or the real estate tax assessment. Therefore I think that it would be in the best interest of the parties to have the Milton appraisal updated. I will not order this, however, both parties will proceed at their own risk if this is not updated. I will consider approving the cost of the update as a cost of the suit to be awarded out of the sale proceeds.

I have received the motion to set aside the verdict and award a new trial by Mr. Hicks.

I intend to rule on that motion on or before our meeting on October 13, 1992. There are two matters that I would like for Mr. Hicks to address further prior to that hearing. First, he asserts certain errors of math. I would greatly appreciate it if he would set forth in advance of the hearing in writing the errors in math which he claims. Mr. Roark certainly has the same opportunity. Next, in paragraph 14 of his preliminary statements, on page 2 of his motion, Mr. Hicks sets forth that my rulings reflect "extreme prejudice by the Judge against Hicks". This is a very serious allegation and I direct Mr. Hicks to set forth in writing what I have done to give him the impression that I have extreme prejudice towards him. I am certain that Mr. Hicks does not agree with my rulings. I do not know, however, how I could have prejudice against either Mr. Hicks or Mr. Roark as I have never known either one of them prior to this proceeding. Nonetheless, this is a serious allegation and must be addressed.

Next, each party is certainly entitled to

its appellate rights. I do encourage any party to exercise its right of appeal if it is so advised. I note, however, that one theme that seemed to run throughout the proceedings before me is that the parties wish to bring this matter to a conclusion. I urge each party to maturely reflect whether or not an appeal will serve any beneficial purpose. By my count this case has now been through three Circuit Court Judges and two Commissioners in Chancery. It has been pending for over a decade. It has been to the Virginia Supreme Court and back one time. The attorney fees and costs must be massive. I could easily see this case going on another two or three years at the present rate.

Thank you for your cooperation. I look forward to seeing you on October 13, 1992.

Sincerely yours,

J. Michael Gamble, Judge

JMG/kst

VIRGINIA: IN THE CIRCUIT COURT FOR CAMPBELL COUNTY

JOHN E. ROARK, JR., and
ROADSIDE NURSERIES, INC.,
a Virginia corporation,
Plaintiffs,

v.

R. WAYNE HICKS,
Defendant

REPORT OF COMMISSIONER

TO THE HONORABLE J. MICHAEL GAMBLE, JUDGE OF SAID COURT:

The undersigned Commissioner appointed by this Court by Decree of Reference entered in this cause on July 19, 1988, respectfully files the following report:

Pursuant to the aforesaid Decree of Reference, your Commissioner, after proper Notice, held hearings on November 2 and 30, 1988, and on December 1 and 2, 1988, at which times evidence was received and testimony of witnesses was taken.

FINDINGS OF FACT

The record before the undersigned

Commissioner is voluminous. Pursuant to Section 3b of the Decree in Reference entered in this cause on July 19, 1988, all evidence in the first trial will be considered evidence in this action, together with such additional relevant evidence which has been submitted and admitted by the undersigned Commissioner.

Although several issues between the parties are in controversy, the broad pattern of the facts of the case is essentially undisputed. R. Wayne Hicks, a certified public accountant practicing in Altavista, Virginia, served as the accountant for Roadside Nurseries, Inc., a corporation operating in Altavista under the trade name of Honeyshuck Farms. John E. Roark, Jr., was the sole shareholder of Roadside Nurseries, Inc.

In 1976 Mr. Roark and Mr. Hicks began discussing the possibilities of entering into a joint venture for the purchase and development of a tract of commercial property in the Lynchburg, Virginia, area. (Tr. I at 72) The general agreement between the parties was for

Mr. Roark and Mr. Hicks each to put up $ 30,000.00 in cash in order to purchase a suitable tract of land, whereon a small shopping center (later called Windcrest Manor) was to be built. Once the shopping center was built, the plan was to have Honeyshuck Farms relocate its operations to the Lynchburg center and serve as an anchor tenant. (Tr. III at 359)

A suitable tract of land was eventually located by the parties, but, when it came time to sign the contract, Mr. Roark was unable to produce his $ 30,000.00. As a result, Mr. Hicks bought the property and took title entirely in his own name. The purchase price for the property was $ 120,000.00, of which $ 30,000.00 was paid in cash and $ 90,000.00 was secured by a purchase money deed of trust. (Tr. I at 195, 196) Although no written partnership agreement was ever drafted, there was a mutual agreement between the parties that a partnership or joint venture would be formed, at least at such time as Mr. Roark was able to

contribute his $ 30,000.00 (Tr. I at 75)

With the property having been deeded to Hicks on or about August 31, 1976, development of the property began the following year. With the support of Hicks, construction of the shopping center was initially supervised by Roark. In addition to Hicks' encouragement of Roark to participate actively in the development of the shopping center, there was an understanding between the parties that Roark would be reimbursed for his time, expenses, and investment in equipment. As is indicated by Roark's testimony, however, the nature and timing of any reimbursement payment was never established:

> Q. Were you ever able to get an understanding with Mr. Hicks how you would be reimbursed?
>
> A. No. There was nothing really nailed down...he (Hicks) promised me then, if you (Roark) just keep this going -- we've got too much invested. We can't stop now. I (Hicks) promise you you'll be reimbursed for whatever

efforts you've put in here. (Tr. II at 371) In June of 1977, supervision of construction of Windcrest Manor was turned over to Myers, a general contractor.

Under the lease from Hicks, Roadside Nurseries, Inc., moved into Windcrest Manor and began operations from two locations in the center. One building occupied was the garden shop property, known as the "Barn", upon which there was a signed lease, which lease was to Roadside Nurseries, Inc., and was guaranteed personally by Roark and his wife, Jane. (Tr. III at 253, 254, 433; Exh. 5-B) The second building was the Honeyshuck Farms gift shop, which was occupied under an oral lease without any personal guarantees of Roark or his wife. (Tr. III at 433)

Throughout the developmental stages of the shopping center project, discussions continued regarding the creation of a partnership between the parties. The unwritten agreement continued to be that Roark would be permitted to buy into the project when he became "financially able"

to do so (Exh. 13). Roark was apparently never able to produce the money required to enter into a partnership with Hicks, and consequently no formal partnership was ever formed.

A meeting between the parties on or about August 4, 1978, ended any hopes for creation of a partnership or the continuation of any joint venture between Roark and Hicks which may have existed. Mr. Hicks said of this meeting that it:

was the last time I considered Roark to have--to be--and I really didn't consider it then to be--a real possibility of him entering into--honoring his agreements and entering into a partnership agreement with me. (Tr. I at 86)

Mr. Roark testified in the proceeding before the original Commissioner regarding this meeting that:

At that time I told him--and I think we had a gentlemen's agreement that we were not going to go in business together. We did not want a partnership. He did not want a partnership, nor did I. (Tr. of proceeding

before first Commissioner at 205)

At the August 4, 1978, meeting Roark presented Hicks will a bill for $ 18,440.14, representing his time and contribution to construction and improvements at the shopping center projects. Mr. Hicks testified that he did not consult Mr. Roark on matters involving Windcrest Court after their August 4, 1978, meeting. (Tr. I at 88)

Roadside Nurseries, Inc., in 1981 became substantially in arrears in its rent payments to Hicks.[1] When the delinquencies were not satisfied, Hicks directed ~~Ro~~adside Nurseries, Inc., to vacate the premises. The gift shop

[1]Hicks obtained a loan evidenced by a note from the First National Bank of Altavista in the sum of $ 8,214.96, which represented the amount of the rent delinquency at that time. The note was dated January 18, 1982, and had a maturity date of July 16, 1982. Although Hicks testified that he believed he was signing the note as an "endorser", the Supreme Court held him to be a "co-maker" of the note, along with Roadside Nurseries, Inc., and Mr. and Mrs. Roark (234 Va. 470, 362 S.E. 2d 711 (1987)). When Roark failed to pay the note when it became due, Hicks paid the note and in consideration had the note assigned to him. The Supreme Court held that Hicks was a co-maker on the note and consequently dismissed Hicks' action on the note. The question of whether Hicks is entitled to credit for the $ 8,214.96 in an accounting between the parties is addressed later in this report. The proceeds of the note were not reported as Rent Received in Hicks' tabulations.

was vacated by Roadside Nurseries, Inc., on November 27, 1982, and the "Barn" was vacated during the first week of December 1982. Roadside Nurseries, Inc., had on October 12, 1982, filed for bankruptcy, and no distribution to unsecured creditors was made by its Trustee.

On or about August 17, 1982, Roark and Roadside Nurseries, Inc., filed a chancery suit against Hicks, praying for an accounting of the transactions of the joint venture, enforcement of Roark's claim to an ownership interest, and damages. Hicks then filed an action at law against Roadside and both Roarks on the note as to which they had defaulted and which Hicks subsequently paid (see supra, footnote 1). Hicks' action at law was transferred to the chancery side of the court, and the cases were consolidated and referred to a commissioner in chancery for hearing and report.

The Commissioner filed his report, the report was affirmed in its entirety by the trial court, and a final decree was entered accordingly. Both parties assigned error, and

an appeal was granted by the Virginia Supreme Court to both Roark and Hicks. The Supreme Court held, inter alia, that a joint venture had been created, that the five-year statute of limitation period governing actions between partners was controlling in disputes between joint ventures, and that Roark was therefore not barred from bringing an action against Hicks. This decision reversed the lower court, which had held that Roark's claim was time barred under the three-year limitation period governing actions on oral contracts. The case was then remanded to the circuit court for further proceedings consistent with Virginia Supreme Court decision. On July 19, 1988, the matter was referred to the undersigned Commissioner.

ISSUES AND FINDINGS OF LAW

At the outset it should be noted that the undersigned Commissioner has concluded that he is not bound by the factual findings of the previous Commissioner. The previous Commissioner determined that the services

rendered by Mr. Roark amounted to $ 18,440.14, but went on to find that the statute of limitations barred any recovery of that amount from Mr. Hicks. There is nothing in the record to indicate that he reviewed the merits of this claim in any detail, since he held it was time barred. The Virginia Supreme Court, however, held that Mr. Roark's claim was not time barred by the statute of limitations and remanded this issue back to the Circuit Court for further proceedings consistent with the Supreme Court decision.

Because nothing in the Decree of Reference or the Virginia Supreme Court decision indicates that the undersigned Commissioner must be bound by the determinations of the previous Commissioner, and because it does not appear that this issue was fully explored in the earlier proceedings, the undersigned has conducted an independent review of the transactions of the joint venture in question and has arrived at his decision independent of any prior findings on this issue.

Since the point has been ruled on expressly by the Supreme Court of Virginia in the prior proceedings, there is no occasion to revisit the question of whether or not a joint venture was created. Hicks' contentions that, although the creation of a joint venture was discussed, it never came into existence as a result of Roark's failure to make his initial capital contribution, need not be considered here. That much, at least, has been settled.

But the next question cannot be resolved that easily. This is the question of how long the joint venture is considered to have continued. The decision of the Supreme Court (Id. at 713) would seem to establish that the date of dissolution was August 4, 1978. However, as stated in Virginia Code § 50-30, "[o]n dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." While the decree of reference suggests using December 31, 1987, for purposes of a final date, the facts as adduced at the hearings before this

Commissioner show that this will not comply with the statute.

In view of the express terms of the Decree of Reference and the unwillingness of the parties to agree on a modification of the Decree to incorporate later transactions, this report has been prepared in two parts, one dealing only with the transactions through December 31, 1987, and a supplemental report covering the transactions since that date.

The Supreme Court's determination that a joint venture existed brings with it the inclusion of the real estate within the joint venture. While your Commissioner explored with the parties the possibility of an agreement as to the present value of the real estate, no agreement on this could be reached. The matter of having the property independently appraised was next discussed, but both parties felt this would be a needless expense until other aspects of the case were resolved, since the resolution of other matters might take so long as to make the appraisal (even if agreed upon) outdated.

The parties claimed to be seeking a mutually agreeable sale of the property, but this has not yet been accomplished. The final alternative of a forced sale on the property also was not available, since the parties insisted on a determination of the rest of their respective accounts before such a sale, so that they might each know in advance how much he could bid by using the balance in his account against the purchase price.

Accordingly, your Commissioner is left in something of an impasse. While the obvious purpose of the decree of reference was to conclude the entire matter once and for all, it seems that this will be impossible. What appears as the only available solution is to try to resolve all other issues except the value of the real estate and then establish a formula, so that the real estate can be sold with the parties being advised of the status of their respective accounts with the joint venture, and then the final results will be known from the application of simple

arithmetic.

To that end, your Commissioner has undertaken to analyze the transactions of the joint venture, both before and after the date of dissolution, but leaving unresolved the matter of the present value of the real estate. This is intended to focus on controverted items and to lay out in sufficient detail what is determined in order to facilitate the filing of objections on discrete enough groups of items to permit rulings without the necessity of going over all the details again.

The rules to be applied to this analysis of transactions are set forth quite clearly in the statute, Virginia Code § 50-18. This section provides (in the absence of specific contrary agreement, which agreement is not alleged by either party here):

(a) Each partner is entitled to receive back his contributions to capital and any advances, after all partnership liabilities are satisfied.

(b) Profits and losses are to be divided

equally, with each partner being obliged to contribute an equal share of the amount needed to make up losses.

(c) A partner is entitled to be indemnified by the partnership for personal payments made on behalf of the partnership in the ordinary course of business or to preserve partnership property.

(d) Payments on behalf of the partnership in excess of those agreed bear interest from the date of payment.

(e) Interest on contributions to partnership capital is earned only from the date repayment "should be made".

(f) No partner is entitled to remuneration for acting in the partnership business.

The foregoing summary of the statutory provisions shows that one certain point of controversy will be the allowance of interest -- on which transactions, for what period, at what rate. Since the initial transaction of the joint venture was the contribution of

capital in order to purchase the real estate, this was one transaction whose terms do not seem to be in dispute. Both parties agree that each was to invest $ 30,000.00 as the initial capital of the venture, and it is not disputed that Roark did not make this investment. Accordingly, he should be charged with this contribution and interest on it should accrue from the date of Hicks' investment, namely, August 31, 1976.

As to the rate of interest, the statute is explicit that, in the absence of an express contract to pay interest at a specified rate, the "legal rate" will apply. Virginia Code §6.1-330.53. Since this rate has been changed by the legislature over the period involved here, your Commissioner finds that the earlier statutory rate (6%) will apply up to the effective date of the amendment to the statute, July 1, 1987. Thereafter, the statutes makes an eight per cent (8%) rate applicable.

While some might consider that the expenditures of the joint venture for capital

improvements of the property (and payments of the balance of the purchase price) constituted "contribution to partnership capital." Your Commissioner has not treated them as such. Since the interest paid by the joint venture on the borrowings for these purposes have been considered as part of the operations of the joint venture and the funds of the joint venture were used for these purposes to the extent that they were available.

In the presentation of his case before your Commissioner, Hicks took the position that he was entitled to interest on the entire amount of his net cash advances (at various rates from 7.6% to 17.0%) and that this should be compounded annually. Your Commissioner can find nothing in the statutes to support this position. The law in Virginia is clear that interest is never compounded in the absence of express agreement, and there is no allegation of the existence of any such express agreement. Pindall v. Bank of Marrietta, 37 Va. (10 Leigh) 481 (1839). And it does not appear that Hicks'

provision of operating capital on a day-to-day basis was "in excess of amounts agreed upon." He testified that the rates he used in these calculations corresponded to the rates he was charged in borrowing for the venture, but offered no specific evidence of any such loans. The exhibits filed by Hicks included a schedule labeled Note Payments, but this included many payments to other than banks and showed nothing at all as to the face amounts of the notes, their time or interest rates, or anything else which would tie these payments into the affairs of the joint venture.

Accordingly, your Commissioner rules that except for the interest paid as an operating expense by the joint venture on what were in fact (even though not in form) its debts (the purchase money debt on the land), no interest is allowable to either joint venturer except the interest charged against Roark on the initial capital contribution he failed to make.

With respect to the operations of the joint venture, the tabulations of receipts and

disbursements introduced by Hicks have in general been accepted except as particular problems were raised in the course of the examination of witnesses. So far as practical, capital expenditures have been segregated from operating transactions, but the payments to an architect for plans which were never used have been allowed as an operating expense. The only evidence offered as to the expense of depreciation of the improvements and equipment was copies of Hicks' personal tax returns. These returns show the amounts that Hicks claimed as a tax deduction, but are not easily tied to the records of the joint venture and do not purport to conform to proper accounting principles being completed strictly according to tax rules which do not attempt to conform to accounting standards. Not reflecting depreciation will not affect the final conclusion, since the sale of the property will demonstrate what the actual appreciation or depreciation was.

Only two categories of expenses claimed by

Hicks have been disregarded in the following calculations. One of these was "Auto and travel" which was admittedly an incomplete and irregularly recorded item involving estimated expenses of Hicks' trips from Altavista to Lynchburg and return (ranging from less than $ 10 one year to $ 739.81 another year). The other was labeled "Shoppe by the Grapevine." Testimony showed that the items charged here represented unrecovered expenses of a separate shop in the center operated unsuccessfully by Hicks' daughter, which Hicks felt should be paid for by the center so that the shop did not close and thereby adversely effect other tenants. It may be noted that the records of rents received shows only two payments of rent by this business and both of these were reversed when the checks received were not honored.

On the foregoing premises, your Commissioner determines the Profits and Losses of the joint venture to be as follows (exclusive of depreciation, as noted above):

Calendar Year 1976:

Rent Received		$ 1,209.00
Expenses:		
Repairs	$ 98.85	
Yard Maintenance	45.00	
Insurance	171.00	
Real Estate Taxes	120.75	
Miscellaneous	9.45	445.05
Profit for Year		$ 764.95
Roark's Share		$ 382.47
Hicks' Share	$ 382.47	
Capital Outlay	2,783.29	
Investment	30,000.00	
Capital Balance		$33,165.78

For the calendar year 1977, the pattern is slightly different since it is only for that year that Roark claimed disbursements not reflected in the Hicks tabulations. The amounts claimed by Roark are not classified under the same headings used by Hicks, but for purposes of this report have been included under the same set of headings on a slightly arbitrary basis.

Two items in the Roark claim require special comment. Just as the "auto and travel" item claimed by Hicks has been disregarded, it seems only fair to disregard the obviously arbitrary and estimated figure of $ 1,000.00 claimed by Roark for "Gas and Repairs to Truck." Secondly, Roark has claimed $ 5,600 for "Salary." As noted above, the statute provides that no partner is entitled to compensation for his services to the joint venture in the absence of express agreement to the contrary. While is may be alleged that Hicks' promises to see that Roark was compensated referred to above satisfied this agreement, it is not clear whether these promises referred just to amounts expended by Roark or also included a provision for salary to him individually. Since the practical effect of the joint venture worked out that Hicks supplied the capital (after his initial investments) without direct compensation, it would appear only fair that Roark should not receive direct compensation for the personal

efforts he expended. Accordingly, in the 1977 recapitulation, Roark's claim has been included to the extent of $ 9,265.34 under the heading of "Special Yard Expense," $ 200 under "Repairs," and $2374.80 under "Capital Outlays."

Calendar Year 1977

Rent Received		$ 3,731.75
Expenses:		
Repairs	$ 200.00	
Yard Maintenance	623.01	
Insurance	754.00	
Real Estate Taxes	362.25	
Legal 150.00		
Architect	883.26	
Mortgage Interest	4,200.00	
Special Yard Exp	10,938.19	
Miscellaneous	(22.80)	18,087.91
(Loss) for Year		$14,356.16
Roark's Share	($7,178.08)	
Capital Outlay	2,374.80	($4,803.28)
Hicks' Share	($7,178.08)	
Capital Outlay	145,066.86	

Addition to Hicks' Capital		$137,888.78
Calendar Year 1978		
Rent Received		$ 31,539.37
Expenses:		
Repairs	$ 2,676.92	
Utilities	588.62	
Insurance	1,111.00	
Real Estate Taxes	1,214.33	
Mortgage Interest	6,480.00	
Special Yard Exp	157.83	
Miscellaneous	794.22	13,022.92
Profit for Year		$18,516.45
Roark's Share		$9,258.22
Hicks' Share	$9,258.23	
Capital Outlay	19,265.95	
Addition to Hicks' Capital		$28,524.18
Calendar Year 1979		
Rent Received		$ 32,682.76
Expenses:		
Repairs	$ 3,759.31	
Utilities	842.49	
Insurance	1,037.00	
Real Estate Taxes	1,214.33	

Legal	390.21	
Mortgage Interest	5,760.00	
Special Yard Exp	325.30	
Snow Removal	765.00	
Miscellaneous	363.36	13,857.00
Profit for Year		$18,815.76
Roark's Share		$9,407.88
Hicks' Share	$9,407.88	
Capital Outlay	9,000.00	
Addition to Hicks' Capital		$18,407.88

Calendar Year 1980

Rent Received		$ 34,490.50
Expenses:		
Repairs	$ 600.45	
Yard Maintenance	600.00	
Utilities	872.48	
Insurance	823.00	
Real Estate Taxes	1,214.33	
Legal	50.00	
Mortgage Interest	5,040.00	
Special Yard Exp	88.53	
Snow Removal	325.00	
Miscellaneous	60.29	9,674.06

Profit for Year		$24,816.44
Roark's Share		$12,408.22
Hicks' Share	$12,408.22	
Capital Outlay	9,000.00	
Addition to Hicks' Capital		$21,408.22
Calendar Year 1981		
Rent Received		$29,867.99
Expenses:		
Repairs	$ 1,600.39	
Yard Maintenance	2,400.00	
Utilities	953.04	
Insurance	1,217.00	
Real Estate Taxes	1,283.85	
Architect	985.00	
Mortgage Interest	4,320.00	
Special Yard Exp	180.14	
Miscellaneous	55.00	12,994.42
Profit or Loss for Year		$16,873.37
Roark's Share		$ 8,436.68
Hicks' Share	$ 8,436.68	
Capital Outlay	10,204.88	
Addition to Hicks' Capital		$18,641.57
Calendar Year 1982		

Rent Received		$22,680.85
Expenses:		
Repairs	$ 454.95	
Yard Maintenance	2,400.00	
Utilities	1,014.99	
Insurance	746.00	
Real Estate Taxes	1,285.74	
Architect	6,229.07	
Mortgage Interest	3,600.00	
Special Yard Exp	37.24	
Miscellaneous	102.89	15,870.88
Profit or Loss for Year		$ 6,809.97
Roark's Share		$ 3,404.98
Hicks' Share	$ 3,404.99	
Capital Outlay	9,000.00	
Addition to Hicks' Capital		$12,404.99
Calendar Year 1983		
Rent Received		$ 16,090.32
Expenses:		
Repairs	$ 986.33	
Yard Maintenance	2,255.00	
Utilities	2,449.89	
Insurance	812.00	

Real Estate Taxes	1,285.74	
Mortgage Interest	2,880.00	
Special Yard Exp	293.21	
Miscellaneous	340.80	11,302.97
Profit or Loss for Year		$ 4,787.35
Roark's Share		$ 2,393.67
Hicks' Share	$ 2,393.68	
Capital Outlay	9,000.00	
Less Sale of Tractor	(1,700.00)	
Addition to Hicks' Capital		$10,943.68

Calendar Year 1984

Rent Received		$ 22,990.87
Expenses:		
Repairs	$ (999.33)	
Yard Maintenance	2,230.00	
Utilities	3,899.80	
Insurance	758.00	
Real Estate Taxes	1,257.39	
Mortgage Interest	2,160.00	
Miscellaneous	982.01	10,287.86
Profit or Loss for Year		$12,703.01
Roark's Share		$ 6,351.50
Hicks' Share	$ 6,351.50	

Capital Outlay	38,322.14	
Less Sale of Tractor	(200.00)	
Addition to Hicks' Capital		$44,473.65
Calendar Year 1985		
Rent Received		$ 23,422.49
Expenses:		
Repairs	$ 264.12	
Yard Maintenance	2,520.00	
Utilities	3,632.71	
Real Estate Taxes	1,441.53	
Architect	110.00	
Mortgage Interest	1,320.00	
Special Yard Exp.	112.51	
Miscellaneous	444.00	9,844.87
Profit or Loss for Year		$13,577.62
Roark's Share		$ 6,788.81
Hicks' Share	$ 6,788.81	
Capital Outlay	40,795.56	
Addition to Hicks' Capital		$47,584.37
Calendar Year 1986		
Rent Received		$21,666.37
Expenses:		
Repairs	$ 783.17	

Yard Maintenance	2,590.00	
Utilities	3,682.10	
Real Estate Taxes	1,441.53	
Special Yard Exp.	599.77	
Miscellaneous	81.00	11,174.77
Profit or Loss for Year		$10,491.60
Roark's Share		$ 5,245.80
Hicks' Share	$ 5,245.80	
Addition to Hicks' Capital		$ 5,245.80

(See Summary on Next Sheet)

One other adjustment of the foregoing summary would seem to be in order. This concerns the unpaid rent of Roadside Nurseries, Inc. The parties apparently agreed on the amount of this when they executed the note referred to above in footnote 1. Since this amount was not included in Hicks' tabulation of rent received, it would have increased the profit of each party by one-half (or $4,107.48) if it had been included. Accordingly, it seems to your Commissioner proper to increase Hicks' capital amount and decrease Roark's by that amount.

Next must be addressed what the applicability of this summary is when the property has not been sold. With the property still on hand and the venture consequently not terminated, this is only an interim statement of the relative position of the parties, showing a starting point for the determination of their positions if the real estate had been sold on December 31, 1987. If it had been sold on that date, the difference between the cost of the property ($ 120,000.00) plus improvements ($234,163.48) and the net proceeds of the sale would have been the profit or loss on the sale and this amount would have been added or subtracted from the balances shown in the above summary.

Since the property has not been sold, these figures will all have to be carried forward and updated to reflect the transactions of the intervening three years and on until the property is sold. The profit and losses of the period after December 31, 1987, must necessarily be taken into account in order to

determine the balances on the date of sale. A supplemental report showing the information available for the years 1988 through 1990 is being submitted, but it should be noted that the figures for these years are simply those compiled by Hicks without any opportunity for cross-examination or rebuttal. Hopefully, the parties can agree between themselves as to any adjustments of these figures which result from the consideration of this report, objections thereto, and possible appeals from rulings thereon. Otherwise, this litigation may be expected to continue almost into perpetuity.

One incidental matter for the court's consideration is the status of Roadside Nurseries, Inc., as a party plaintiff. The evidence before your Commissioner is that the only part which that corporation had in this litigation was as a defendant in Hicks' suit on the note described in Footnote 1 above. Since the ruling of the Virginia Supreme Court held that the corporation was not liable in that suit, this would seem to conclude its

participation in the matter. Also the evidence showed that the corporation had been liquidated in bankruptcy and presumably had ceased to exist as a result of the revocation of its charter. Accordingly, there would seem to be no useful purpose for continuing it as a party and it might well be dismissed. This would reduce, if only by a tiny bit, the procedural problems of this case.

Turning to the specific directions of the Decree of Reference to make sure that all possible points have been covered, we find the following:

1. The direction to file a complete accounting for the joint venture is, I believe, covered by the material presented above, although, for the reasons stated, this accounting does not permit the joint venture to "be fully terminated and wound up."

2a. The profits and losses of the venture for the periods from 1976 through 1987 are set forth above. Tentative figures for the years 1988 through 1990 are included in a

supplemental report.

2b. For the reasons indicated above, it has not been possible for your Commissioner to determine the fair market value of the present assets of the joint venture. The deed of trust on the property has been paid off and there has been no testimony indicating any liabilities other than for current operating expenses.

2c. The division of profits and losses between the joint venturers is provided by statute. Your Commissioner finds that after charging Roark with interest at the legal rate on the capital he failed to contribute ($30,000), remaining profits and losses should be divided equally. The division of the assets will have to be by sale, since the parties are unable to agree on any other approach. If they will agree on a private sale, this would be desirable, but otherwise a sale at public auction appears necessary. The division of the proceeds of sale has been indicated above, but, as stated there, the figures given there must be adjusted for the operating income and

expenses of the venture up to the date of sale.

2d. This is covered in 2c. above.

2e. The amount due Roark from the joint venture is shown from this foregoing material. It does not appear that Hicks (as opposed to the joint venture) owes Roark any thing.

2f. The material presented above gives the principal and income of the joint venture.

2g. The only interest allowed by the Commissioner is the interest charged Roark on the capital account he failed to provide and this is allowed at the statutory legal rate. As shown above, this amounts to $ 20,700.00 through December 31, 1987, but additional interest will continue to accrue until the venture is terminated.

2h. This is shown in the tabulations above.

2i. The date of dissolution (<u>not</u> termination) has been set by the Virginia Supreme Court at August 4, 1978.

2j. No other matters have been requested by either party to be reported on, except that

Hicks' counsel has requested the Commissioner to report on the transactions of the joint venture for the years 1988 through 1990. Because this material has not been subjected to cross-examination or rebuttal, it is being filed in a separate supplemental report.

While the Decree of Reference in paragraph 3a. directs your Commissioner to treat the "cut-off date for the termination and winding up of the joint venture" as December 31, 1987, this was not possible, since the property had not been sold at this date.

CONCLUSION

The undersigned Commissioner for research, conducting four days of hearings, and writing this report prays for a fee of $ 8,720.00 and reimbursement of expenses in the amount of $91.39 be allowed him as reasonable compensation under §14.1-333 of the Code of Virginia. The fee of the court reporter for taking the hearings and transcribing them in the amount of $ 1915.16 was paid by the parties in equal shares. Your Commissioner recommends

that this allocation be approved.

The undersigned Commissioner certifies that on or before the date that this report was filed in the Clerk's Office of the Circuit Court of Campbell County he gave notice in writing to all parties who appeared in this cause or their counsels of record in accordance with Rule 2:18 of the Rules of the Court and in addition thereto furnished said counsel with copies of said report a reasonable time before the same was filed.

All of which is respectfully submitted this 31st day of May, 1991.

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Robert M. Musselman

Commissioner in Chancery of the

Circuit Court of Campbell County

Note:
Exhibit B, Page 203 contains Commissioner Musselman's Summary sheet referred to on page 181 of this appendix. Petitioner could not meaningfully reproduce this document in the format required by the rules of the U. S. Supreme Court.

VIRGINIA: IN THE CIRCUIT COURT FOR CAMPBELL COUNTY

JOHN E. ROARK, JR., and
ROADSIDE NURSERIES, INC.,
a Virginia corporation,
Plaintiffs,

v.

R. WAYNE HICKS,
Defendant

SUPPLEMENTAL REPORT OF COMMISSIONER

TO THE HONORABLE J. MICHAEL GAMBLE, JUDGE OF SAID COURT:

The undersigned Commissioner was appointed by this Court by Decree of Reference entered in this cause on July 19, 1988. Part 3a. of the Decree in Reference instructed the undersigned Commissioner to use December 31, 1987, as the cut-off date for the termination and winding up of the joint venture. This date was used in your Commissioner's Report filed simultaneously with this Supplemental Report.

For the reasons set forth in your Commissioner's Report, not the least of which is the fact that the property in question has

not been sold, your Commissioner believes it necessary to file this Supplemental Report with respect to the years 1988 through 1990.

Based on the premises set forth in your Commissioner's Report, the undersigned Commissioner files the following Supplemental Report.

Calendar Year 1988:

Rent Received		$ 20,056.12
Expenses:		
Repairs	678.90	
Yard Maintenance	2,595.00	
Utilities	2,915.00	
Insurance	1,421.46	
Real Estate Taxes	1,601.10	9,212.32
Profit or Loss for Year		$ 10,843.80
Roark's Share		$ 5,421.90
Hicks' Share	$5,421.90	
Capital Outlay	(11,410.00)	9,212.32
Addition to Hicks' Capital		(5,988.10)

* Proceeds of lapsed option contract.

Calendar Year 1989:

Rent Received		$ 14,527.77
Expenses:		
Repairs	$3,792.77	
Yard Maintenance	2,220.06	
Utilities	1,123.39	
Real Estate Taxes	1,601.10	
Commissions	812.00	$ 9,549.26
Profit of Loss for Year		$ 4,978.51
Roark's Share		$ 2,489.25
Hicks' Share	$2,489.26	
Capital Outlay	.00	
Addition to Hicks' Capital		$ 2,489.26

Calendar Year 1990:

Rent Received		$ 20,880.00
Expenses:		
Insurance	$1,383.00	
Real Estate Taxes	1,586.61	
Commissions	2,088.00	
Miscellaneous	24.00	$ 5,081.61

Profit or Loss for Year		$ 15,798.39
Roark's Share		$ 7,899.20
Hicks' Share	$ 7,899.19	
Capital Outlay	.00	
Addition to Hicks' Capital		$ 7,899.19

As note in the financial report, the foregoing figures are those submitted by Hicks after the formal hearings and consequently have not been subject to cross-examination or rebuttal. They are presented in this same fashion and under the same rules employed in presenting the data for the first twelve years of the venture in order to provide comparability, but they do not represent anything formally admitted into evidence.

_____

Robert M. Mussleman
Commissioner in Chancery of the
Circuit Court of Campbell County

Note:

Exhibit B, Page 204 contains Commissioner Musselman's Summary sheet for this Supplemental Report. Petitioner could not meaningfully reproduce this document in the format required by the rules of the U. S. Supreme Court.

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF CAMPBELL

JOHN E. ROARK, JR., ET AL.,	
Plaintiffs	DEFENDANT'S MEMORANDUM OF LAW And REQUEST FOR AMENDMENT TO DECREE
V.	
R. WAYNE HICKS	
Defendant	

The Defendant desires to bid on the Windcrest property which is the subject of this suit. In order to do so he must know his firm equity in the property as required by law. The Decree issued in this case has mathematical errors and errors in law in regards to the priority of distributions.

The errors of math are detailed in the attached exhibit marked "Exhibit 2" as compared to Court Exhibit #2 dated 8-25-92, copy attached.

Page 15 of the Ruling letter of Judge Gamble, dated August 25, 1992, states:

> "The assets of the venture after payment of any venture debts, will be

divided between Roark and Hicks in accordance with the relative percentage of their capital accounts."

To make distributions in the manner stated is an inequitable division of profits. The capital accounts are already determined, in part, by splitting profits equally. The excess of one partner's account over the other should be distributed first. Next the distributions should be made equally. The same result is obtained by adhering to Code of Virginia, § 50.40(b) quoted as follows:

> "The liabilities of the partnership shall rank in order of payment, as follows:
> (I) Those owing to creditors other than partners;
> (II) Those owing to partners other than for capital and profits;
> (III) Those owing to partners in respect of capital;
> (IV) Those owing to partners in respect of profits."

In order for the Code to be followed, the different components of the capital accounts must be determined. Defendant's calculations are as follows:

	ROARK	HICKS
In respect to amounts due Hicks personally	38,822.67-	38,822.67
In respect to alleged capital	2,374.80	321,788.68
In respect to alleged profits	96,676.87	96,676.87
Corrected Decree equities	60,229.00	457,288.22

Therefore, Code of Virginia requires the order of distribution, after payment of creditors, to be as follows:

(II)	Those owing to partners	38,822.67-	38,822.67
(III)	...in respect of capital	2,374.80	321,788.68
(IV)	... in respect of profits	96,676.87	96,676.87

Therefore, Hicks requests the Court to amend its Decree to correct the equities of each partner and to affirm the priority of distribution of funds to the partners.

Respectfully,

R. Wayne Hicks

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 25th day of June, 1993.

R. Wayne Hicks, Appellant,

against Record No. 930327

John E. Roark, et al., Appellees.

From the Circuit Court of Campbell County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgement complained of. Accordingly, the Court refuses the petition for appeal and denies the appellees' motion to dismiss.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of July, 1993.

R. Wayne Hicks, Appellant,

against Record No. 930327

John E. Roark, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgement rendered herein on the 25th day of June, 1993, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk